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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Seventh Circuit erred in granting a writ of habeas corpus for the murder conviction of Beverly Truitt where the state trial court properly instructed the jury as to this offense but improperly instructed the jury as to the murder of Michael Robbins.

2. Whether the respondent failed to allege a due process violation as to his conviction for the murder of Beverly Truitt in state court which would preclude habeas corpus review by the federal courts pursuant to Wainwright v. Sykes, 433 U.S. 72 (1979).

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No. 85-757

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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MICHAEL LANE, Director of the Illinois Department of Corrections, and JAMES THIERET, Warden, Menard Correctional Center,

Petitioners,

-vs-

FRED REED,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing Fred Reed's two murder convictions while affirming his armed robbery conviction is reported as United States ex rel. Reed v. Lane, 759 F.2d 618 (7th Cir., 1985). The opinion has been submitted to this Court as Appendix A to the Petition for Writ of Certiorari and, therefore, is not contained in the Brief in Opposition.

## JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254 (1).

## STATEMENT OF THE CASE

Respondent, Fred Reed, was convicted after a jury trial in the Circuit Court of Cook County, Illinois of the murders of Michael Robbins and Beverly Truitt and the armed robbery of Ms. Truitt. He received concurrent sentences of 50 to 100 years for each murder and 20 to 30 for the armed robbery.

The Appellate Court of Illinois, First Judicial District, affirmed Mr. Reed's convictions and sentences. People v. Reed,

104 Ill.App.3d 331, 432 N.E.2d 979 (1st Dist., 3rd Div., 1982) The Supreme Court of Illinois denied the petitioner's Petition for Leave to Appeal in an unpublished order.

Subsequently, Fred Reed petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court granted Mr. Reed's application for a writ of habeas corpus and held that petitioners "are ordered to discharge Reed unless the State of Illinois gives him a new trial within a reasonable time." United States ex rel. Reed v. Lane, 571 F. Supp. 530, 534 (N.D. Ill., 1983).

Petitioners appealed the grant of habeas corpus relief to the United States Court of Appeals for the Seventh Circuit. The Court affirmed the district court's "issuance of the writ but stay(ed) it pending Reed's serving of the sentence on the armed robbery charge and 120 days thereafter (for the State to retry him)" in that the court concluded that a retrial of the armed robbery charge was not required. United States ex rel. Reed v. Lane, 759 F.2d 618, 624 (7th Cir., 1985). Subsequently, the court denied petitioners' and respondent's petitions for rehearing and suggestion for rehearing en banc. From the judgment of the Seventh Circuit petitioner brings the instant petition for a writ of certiorari.[1]

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit with respect to the qeustions advanced in the instant petition, because the lower court properly considered and decided those issues. However, it must be emphasized that the respondent in this case, has also filed a petition for writ of certiorari, Reed v. Lane, No. 85-5742, where he contends that the Court of Appeals was correct in issuing the writ for both of his murder

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[1] Respondent has also filed a petition for writ of certiorari with this Court to review the decision of the lower court. Fred Reed v. Michael Lane, No. 85-5742.

convictions but erred in not issuing the writ for a related armed robbery conviction. This brief in opposition does not in any fashion compromise his argument in No. 85-5742 that this Court should grant his petition for writ of certiorari and reverse the Court of Appeals' erroneous decision that he is not entitled to a new trial for the armed robbery of Beverly Truitt, as well as the murders of Ms. Truitt and Michael Robbins.

I THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DID NOT ERR IN GRANTING A WRIT OF HABEAS CORPUS FOR THE TRUITT MURDER CONVICTION BECAUSE THE INSTRUCTION ERROR DENIED RESPONDENT'S DUE PROCESS RIGHTS ON ALL CHARGES WHERE HE WAS ACCOUNTABLE FOR THE TRUITT CRIMES SOLELY AS A RESULT OF HIS ACCOUNTABILITY FOR THE MURDER OF MICHAEL ROBBINS.

Petitioners argue that the Court of Appeals erred in granting the writ of habeas corpus as to the Truitt murder conviction because the error in the instructions for the Robbins murder charge did not affect the Truitt murder charge. (Pet.'s Br. at 4-7) Respondent contends that he is entitled to a new trial for the Truitt murder, also, where had a correctly instructed jury accepted his compulsion theory, he would not have been found accountable for the Truitt murder.

In Illinois, "(a)ccountability for murder can be established by proof that before or during the commission of that offense, with the intent to promote or facilitate it, the defendant aided or abetted or attempted to aid and abet in the murder." People v. Reed, 104 Ill.App.3d 331, 338, 432 N.E.2d 979 (1st Dist., 3rd Div., 1982). In the instant case, as noted by the state appellate court, the murder of Truitt "was a spontaneous reaction of Hall to Truitt's appearance after Robbins' murder." Id. Therefore, if the compulsion defense interposed to the Robbins murder had succeeded, respondent would have been standing in the hallway without criminal liability - an innocent man - when Hall's "spontaneous act" occurred. Therefore, as a matter of Illinois law, respondent could not have "promoted or facilitated" the murder of Truitt "before or during" its commission.

The cases cited by the petitioners, United States v. Leon, 679 F.2d 534 (5th Cir., 1982); United States v. Brown, 692 F.2d 345 (5th Cir., 1982); and United States v. De Luca, 692 F.2d 1277 (9th Cir., 1982), do not apply to the facts of this case. In Leon, the defendants were convicted of conspiracy to acquire, transport, and distribute cocaine and of using a telephone to commit a conspiracy. On appeal, the telephone count was reversed and remanded for a new trial because the jury was not instructed on that charge. The Court did not reverse the other convictions and did not discuss whether they might have been affected by the improper counts. In fact, it does not appear that the defendant challenged the other convictions based on this error. 679 F.2d 534, 541. Regardless, where the alleged use of a telephone was but one aspect of significant evidence of the conspiracy counts, that conviction did not deny defendant a fair trial as to the other counts.

In United States v. Brown, 692 F.2d 345 (5th Cir., 1982), defendant was convicted of five counts of a multi-count indictment charging violations of the Drug Control Act. On appeal he successfully challenged the jury instruction on one of the counts, which did not properly set forth the elements of the offense of "possession, with intent to distribute cocaine." 692 F.2d 345, 348. As the petitioners note (Pet. Br. at 7), only this count was remanded for a new trial. However, once again, there was no discussion concerning how the improper conviction on that count affected the remaining counts and, in fact, the defendant did not raise such an issue.

In United States v. DeLuca, 692 F.2d 1277 (9th Cir., 1982), defendants were convicted of 20 counts of conspiracy and racketeering related charges. One of the conspiracy counts was reversed where it did not properly set forth the elements of the crime. The convictions on that count were reversed and remanded for a new trial and the reversal's affect on the other counts was not discussed. 692 F.2d 1277, 1281. Again, it appears that the other counts were not challenged based on the instruction error, and the Court's opinion indicates ample evidence to support the remaining charges.

All of these cases involve situations where it is clear that the instruction error did not relate to the remaining convictions because separate evidence supported all the charges. They are then distinguishable from the present case. To reiterate, in this case, evidence relating to the Robbins murder was essential to establishing Reed's alleged accountability for the Truitt murder. Therefore, the Court of Appeals was correct in ruling that the state court's error in instructing the jury as to the Robbins murder prejudiced the respondent in regards to the Truitt murder charges.

Petitioners argue that the respondent challenged only the Robbins conviction in the District Court. Pet. Br. at 4-7. This assertion, which the dissent follows [United States ex rel. Reed v. Lane, 759 F.2d 618, 625 n. 1 (7th Cir., 1985)], is fallacious because the respondent, from the outset, has challenged all his convictions based on the due process violation arising from the denial of the compulsion instruction. The failure to give the compulsion instruction triggered consequences that denied the respondent on all the charges. All three convictions were obtained in violation of due process of law. (See: Petition for Writ of Habeas Corpus at 10-11; Reply Memorandum at 3; Response to Motion to Reconsider Memorandum at 3; Fred Reed's Court of Appeals Brief at 26-29).

For these reasons, the Court of Appeals decision which granted respondent relief as to the Truitt murder conviction was proper and does not create a conflict among the circuits. Thus, this Court should not grant the petition.

II. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DID NOT ERR IN GRANTING A WRIT OF HABEAS CORPUS FOR THE MURDER OF BEVERLY TRUITT BECAUSE THE RESPONDENT'S ALLEGATION OF A DUE PROCESS VIOLATION APPLIED TO ALL OF HIS CONVICTIONS.

Although the petitioner accurately and succinctly defines "procedural default" as it applies to federal habeas corpus relief [See Wainwright v. Sykes, 433 U.S. 72 (1977); and Engle v. Isaac, 456 U.S. 107 (1982)], that concept is inapplicable to this

case, as the respondent has consistently alleged that the due process violation in this case prejudiced him in regards to the murder of Michael Robbins as well as the murder and armed robbery of Beverly Truitt.

The evidence upon which the respondent's convictions were based was his statement to the police and the State's Attorney that he had been forced at gunpoint to assist Lonnie Hall in tying up Michael Robbins so that Hall could shoot him; that, as they were leaving the apartment, Beverly Truitt stuck her head out of her apartment door, at which point Hall pushed her back into her apartment and fatally shot her; and that Hall emerged with jewelry, some of which he gave to Reed. Reed's compulsion instruction [Illinois Pattern Instruction 24.21 (criminal)] as to the Robbins murder was tendered but rejected by the trial court.

In alleging a due process violation upon direct appeal to the Appellate Court of Illinois, First Judicial District, the respondent summarized his argument as follows on page 30 of his opening brief:

> "Since a compulsion defense was available to Reed vis-a-vis Robbins' murder, and since the jury was not properly instructed as to this defense, Reed's conviction in Robbins' murder must be reversed. Since the jury could have found Reed not guilty had it been told compulsion was a defense, that finding would have rendered Reed not accountable for the murder and armed robbery of Beverly Truitt, since the sole basis for this finding of accountability was Reed's assistance in the first murder. Thus, if his assistance in the first (murder) was compelled, rendering him not criminally responsible, he was not liable for the murder or armed robbery of Beverly Truitt, in which he played no part. Therefore, his convictions for the murder and armed robbery of Truitt must be reversed."

Thus, it is clear that respondent theorized that the due process violation of not giving a compulsion instruction for the Robbins murder infected the Truitt convictions, as well. Therefore, it is incorrect for petitioners to allege on page 10 of their petition for writ of certiorari that "... the compulsion defense argument with respect to the conviction for the murder of Truitt was not advanced in state court on direct appeal..." Moreover, when the respondent unsuccessfully petitioned for leave to appeal

to the Supreme Court of Illinois, on page 21-22 of the petition he summarized his argument as follows:

> "Since a compulsion defense was available to Mr. Reed vis-a-vis Robbins' murder, and since the jury was not properly instructed as to this defense, Mr. Reed's conviction in Robbins' murder must be reversed. Since the jury could have found Mr. Reed not guilty had it been told compulsion was a defense, that finding would have rendered Mr. Reed not accountable for the murder and armed robbery of Beverly Truitt, since the sole basis for this finding of accountability was Reed's assistance in the first murder. Thus, if his assistance in the first murder was compelled, rendering him not criminally responsible, he was not liable for the murder or armed robbery of Beverly Truitt, in which he played no part. Therefore, his convictions for the murder and armed robbery of Truitt must be reversed.

Thus, the respondent's due process argument in regards to all three convictions was advanced in state court on direct appeal as it was advanced in the district court. With this in mind, the petitioner cannot use Wainwright v. Sykes, to shield him from facing the maritorious argument advanced by the respondent in the lower courts. Consequently, respondent requests this Court to deny the Petition for Writ of Certiorari.

## CONCLUSION

For the reasons stated above, respondent respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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